LIBRARY
SUPREME COURT. U. S.

No. 868

Office - Supreme Court, U.S.
FILED
MAR 21 1958
JOHN T. FEY, Clerk

IN THE

SUPREME COURT

United States

October Term, 1957

In the matter of
AQUA HOTEL CORPORATION, (in re-organization),
Bankrupt.

PETITION FOR WRIT OF CERTIORARI

MORRIS LAVINE,
Attorney at Law
215 West Seventh Street
Los Angeles 14, California
TRinity 3241
Attorney for Petitioners.

TOPICAL INDEX

	Page
Jurisdiction	2
Statement of the Case	2
Questions Presented	9
Reasons for Granting Writ	12
Appendix A—Opinion	App. 1

TABLE OF CASES AND AUTHORITIES CITED

Cases

Continental-Illinois National Bank & Trust Co. v. Ehrhart, 127 Fed. (2d) 341	15
Kelley v. Everglades Drainage District, 319 U.S. 415	15
Powell v. Alabama, 287 U.S. 68, 77 L. Ed. 170	16

Authorities

Bankruptcy Act, Chapter X	2, 3, 13
Bankruptcy Act, Sec. 24, (11 U.S.C. sec. 47 (c))	2
Bankruptcy Act, Section 25 (11 U.S.C. Sec. 48)	2
Bankruptcy Act, Section 250 (11 U.S.C.A. Sec. 650)	7, 11
Fifth Amendment to the Constitution of the United States	14, 16
Rules of Civil Procedure, Rule 52	6, 10
Title 28 U.S. Code, Section 2101 and Section 1254(1)	2

IN THE

SUPREME COURT

United States

October Term, 1957

In the matter of AQUA HOTEL CORPORATION, (in re-organization), *Bankrupt.*	No._____

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice Earl Warren and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioners, Patricia Springer and John Cashen, creditors, and the Aqua Hotel Corporation in re-organization, respectfully petition this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit and in respect thereto set forth as follows:

JURISDICTION

Jurisdiction is conferred by Title 28 U. S. Code, Section 2101 and Section 1254(1) and by Sections 24 (c) of the Bankruptcy Act (11 U.S.C. Sec. 47(c)) and Sec. 25 (11 U.S.C. Sec. 48) Bankruptcy Act. The decision of the court of appeals was rendered December 17, 1957. Petition for re-hearing was duly filed in that court on January 16, 1958 and denied by that court on January 28, 1958. (Opinion below.)

The opinion for the Court of Appeals for the Ninth Circuit is in the appendix to this petition.

STATEMENT OF THE CASE

The Aqua Hotel Corporation was hit by the Nevada depression in Las Vegas in 1956. The brand new hotel located on the famous Las Vegas strip between the Golden Nugget and the Sands Hotel consisting of approximately 4½ acres of choice property was constructed in 1955. Its stock structure consisted of 250,000 Class A shares of stock, of which 112,500 were owned by Patricia Springer and 112,500 by John Cashen, the petitioners herein, and the balance of 5,000 shares were in the possession of their attorney.

On February 14, 1956 the petitioners filed a petition under Chapter X of the Bankruptcy Act setting forth that it was engaged in operating a 62 room hotel with dining room and cocktail lounge facilities at 1401 S. 5th Street, Las Vegas, Nevada. The petition of the

corporation alleged that it was unable to pay its debts as they matured and proposed re-organization under Chapter X of the Bankruptcy Act of its affairs as set forth in the proposed plan of re-organization (R. 1).

It estimated its grand total of indebtedness at $456,022.79 (R. 9); its assets it listed at $603,537.24. Its total net income for six months prior thereto was listed at $47,807.94 (R.10). It set forth that upon re-organization that its estimated profits from food operations could be $368,000 gross and a net of $83,250 and that it had a potential slot-machine profit of $40,000. (R. 13). Without the slot-machines it estimated its profits to be $149,500.

The proposed plan provided the right to submit a modification of it for approval of the creditors before being submitted for confirmation in the event that the debtor was able to re-finance a fixed or long term obligation.

Thomas J. McGlaughlin was appointed as Trustee (R. 17).

The Court gave to May 11, 1956 to submit a plan or a report why a plan cannot be effected (R. 22). The Trustee proposed no new plan and thereupon upon the extended hearings the creditors and petitioners herein who are the principal owners of the stock of the corporation proposed a plan of re-organization in which it was proposed to issue 500,000 shares of additional stock with an application and a right to sell the same at $1.00 a share and Class B stock likewise to be re-

deemable (R. 31). There were notes payable to the officers of the corporation in the amount of $160,022.79.

In the course of the proceedings, the Trustee kept the hotel opened and wages became due which he was unable to meet. Patricia Springer then secured $9,000 by placing a mortgage on certain property in Southern California at his request and advanced the money to the corporation. Of this amount $6,865.45 was spent in the payment of wage claims earned prior to February, 1956 and advanced with the full knowledge of the Trustee.

The Trustee made a report to the Court on the proposed plans of re-organization which he submitted on behalf of the creditors but with an adverse report in opposition and was a recommendation that the corporation be adjudicated a bankrupt. His report stated that without taking any appraisal of the property, that the assets of the corporation amounted to $751,104 (R. 50).

An appraiser hired by the corporation gave a valuation of $846,702 to the property.

The hearing was held at Las Vegas, Nevada for the District Court, on the report of the Trustee upon the proposed plan of arrangement, upon the request for attorney fees and other matters.

The notice of hearing merely set out that it was a notice of hearing on the report of the Trustee (R. 43-44) and for allowances for attorneys fees.

No testimony (other than with respect to attorneys' fees) was offered by anyone except by the petitioners who put an appraiser on the stand to testify to valuation, and Patricia Springer to the services rendered and an effort to set forth the amounts of money advanced. Application was made to the court to permit the proposed plans to be submitted to the creditors which application was summarily denied. The court declined to let the appraisers' valuations be filed or even made an offer of proof. Whereupon the District Judge stated he was going to adjudicate the corporation bankrupt and did so and then set aside his order, continuing the matters for future date, because of applications for allowances for trustee and attorneys' fees. Counsel for petitioners and petitioners resided in Los Angeles, California and returned to Los Angeles under the assumption that no action would be taken, in any event, until a future open court hearing date.

On November 7, the judge signed an order denying approval of the proposed plans of arrangement which order was entered by the Clerk but was never served on opposing counsel nor notice sent to them.

Prior to the hearing on November 5 one of counsel filed an application for a trial by jury on the issue of insolvency if the Court was to adjudicate the corporation a bankrupt.

The Court denied the application for a jury trial (R. 120). The Court also denied re-payment to Mrs.

Springer of the $9,000 advanced by her to the Trustee for the benefit of the corporation and which the corporation had used.

He allowed her only $1,500.00 for wages for working for the corporation after the petition for re-organization had been filed. The demand for jury trial was denied (R. 120).

On November 20th (R. 123) the Court reiterated that it rejected the plan of arrangement and demand for jury trial and asserted (erroneously) notice has been given to all those entitled to it (R. 120), he thereupon proceeded to adjudicate the corporation bankrupt and terminate the appointment of the Trustee under re-organization and to appoint a new Trustee in Bankruptcy and to close the motel until further proceedings.

Thereafter, he made allowances of $8,512.90 to the Trustee and $7,050.29 to the attorney for the Trustee.

He disallowed all other claims for attorneys' fees, disallowed any fees for preparing [illegible]posing the plans for arrangement or for any services rendered by the attorney for the corporation to it.

Notice of Appeal duly followed.

After the case reached the United States Court of Appeals for the Ninth Circuit, a motion was made before that Court to remand the case to the District Court for the appointment of an appraiser and for findings of fact and conclusions of law pursuant to Rule 52 Rules of Civil Procedure.

It appears that the judge's determination in respect to all of the matters were summarily made without any findings of fact or conclusions of law or in fact any testimony before the Court except that offered by the petitioners and by attorneys in respect to their attorneys' fees. No findings were made for or against any of these matters and no conclusions of law were entered.

The motion to remand the case for the appointment of an appraiser so that the Court would truly know the value of the property for an adjudication in bankruptcy was based upon the fact that the Trustee's own statements that the assets were of the corporation were valued at $751,104 (R. 50). An appraiser gave one valuation of $846,702 (R. 90) but the Court did not let him testify fully and it was urged upon the Court of Appeals that before the corporation could be adjudicated a bankrupt that the Court should have the fact of its true valuation from appraisers and that the petitioners were entitled to findings of fact and conclusions of law based upon credible evidence so that the Court of Appeals and the Supreme Court could appropriately determine whether bankruptcy was warranted.

The motion to remand was denied.

This petition is being submitted on the original papers pursuant to the provision of Section 250 of the Bankruptcy Act.

The notice of appeal was from all matters prior to the order entered on November 21, 1956 adjudging Aqua a bankrupt and decreeing bankruptcy proceedings be had pursuant to the applicable provisions of the Bankruptcy Act. In the Court of Appeals, the respondent raised the question of the timeliness of the appeal from the order entered on November 7.

The notice of appeal challenged the order of November 7, 1956 in which the District Court disapproved of the re-organization plans submitted by the appellants and denied application for additional time within which to amend these plans. This order was never noticed to the appellants and no notice was ever served on anyone but it was merely entered and filed.

The petitioners contend that their time did not start to run on the appeal until after they had some form of notice thereof and particularly since the hearing on November 20, 1956 reiterated in its order adjudging Aqua a bankrupt, that it had dispproved appellants' plans for reorganization and had denied the application and that the time for appealing from that order did not start to run until at least that date. The notice of appeal was filed December 18, 1956. The Circuit Court of Appeals took the position that it was without jurisdiction to review the order of November 7, 1956 disapproving the re-organization plan. On petition for re-hearing appellants contended that this would constitute a denial of due process guaranteed by the Fifth Amendment to the Constitution of the

United States and that the appeal timely embraced all of the matters originally heard on November 5th through its conclusion. Petition for re-hearing was denied.

QUESTIONS PRESENTED

1. Whether the court erred in refusing the principal stockholders and creditors the right to submit proposed plans of reorganization to the creditors.

2. Whether the proposed plans of re-organization were fair, equitable and feasible.

3. Whether the circuit court erred in holding that it was without jurisdiction to consider the appeals from the order of November 7, 1956 which the court signed without notice to appellants or anyone else in which the court disapproved the reorganization plans submitted by appellants and denied the application for additional time within which to amend these plans. The court on November 20 in court recited its denial of the proposed plan of reorganization in adjudicating the corporation "bankrupt" and decreeing that bankruptcy proceedings be proceeded with. Notice of Appeal was filed December 18, 1956 from all orders. The question is involved as to whether the notice of appeal was timely as to all questions involved, including the disapproval of the plans of reorganization.

4. Whether the notices sent out to creditors, including appellants, that the court would consider a

plan of reorganization or a report on why such a plan cannot be effected (R. 22, 25) was a sufficient notice that the corporation would be adjudicated a bankrupt.

5. Whether before the corporation could be adjudicated a bankrupt it was necessary to hold hearing on whether the corporation is actually "bankrupt," to take evidence, to hear witnesses, to have the property appraised and a fair report as to its actual value and its potential value and earnings, and to make findings of fact and conclusions of law as provided by Rule 52, Rules of Civil Procedure for the District Courts of the United States.

6. Whether the Circuit Court erred in refusing to remand the case to the District Court for the purpose of appointing an appraiser, and to take evidence, make findings of fact and conclusions of law under Rule 52 Rules of Civil Procedure.

7. Whether the District Court erred in adjudicating the corporation a bankrupt; (a) whether the notice was adequate; (b) whether there was any basis without the taking of evidence; (c) whether it was bankrupt even though it may be solvent; (d) whether a corporation whose assets are at least $751,104.44 and its total estimated obligations (secured and unsecured) are estimated at $721,346.85 is in fact "bankrupt."

8. Whether an order to proceed with a hearing on the questoin of whether the corporation should be adjudicated bankrupt entitles it to a trial by jury on the

issue of insolvency, a demand for jury trial having previously been made in writing with the court, and denied. (R. 120).

9. Whether the principal stockholder, who advanced personal funds to the trustee in reorganization to meet hotel operating payrolls and other expenses incurred by the trustee when he had no immediate cash, is entitled to recover those funds, and whether a denial of them to her, was error.

10. Whether the attorneys for the corporation and creditors are entitled to compensation for the work, as applied for, and whether the circuit court erred in holding that appeals from denials of compensation and reimbursement of expenses are not to be considered under the general notice of appeal from the orders but that "appeals from *all* orders making or refusing allowances in such proceedings are governed by Section 250 of the Bankruptcy Act (11 U.S.C.A. Sec. 650).

11. Whether appellants, after filing notice of appeal in the District Court, from the orders of the District Court, must file separate applications to the Circuit Court for leave to appeal from the challenged orders making and refusing to make allowances.

12. Whether the circuit court erred in refusing the appellant's motion to remand the case to the District Court with directions to appoint an appraiser, and to take his and other testimony concerning the actual value of the debtor's property and testimony as to

the fairness and feasibility of the proposed plans of reorganization, and to make findings of fact and conclusions of law thereon.

REASONS FOR GRANTING WRIT

Important questions of bankruptcy law, which have not been, but should be decided by this Honorable Court, are presented by this petition.

The court below has also decided this case contrary to the law and contrary to Rules of Civil Procedure, Rule 52, Requiring findings of fact and conclusions of law to be stated, in bankruptcy, as well as other matters.

The corporate property, of which the petitioners Springer and Cashen were the principal stockholders, hit the Las Vegas slump (see Life magazine) and ran into difficulties because of it. But it possessed a new hotel, fully furnished with television and radio in each room, new equipment, and four and a half acres of land on the "strip"—a swimming pool, and other complete facilities. Reorganization therefore was fully possible. Nevertheless, the trustee came up with no new plan, no reorganization of the stock structure, and nothing to bail out the tentative financial stringency. It would seem that with such wonderful assets a plan to get fresh money from the sale of $1 stock was easily feasible, especially with the gambling fraternity or elsewhere. The trustee and trial court treated the corporation solely as headed for bankruptcy, and that

all that was necessary was to go through the preliminary motions of holding a hearing on why a plan of reorganization cannot be accepted. The court refused to let petitioners go to the creditors with the plan, a requirement in Chapter X before consents can be solicited; then proceeded to deny jury trial and to adjudicate the corporation bankrupt.

When the trustee in reorganization failed to come up with a plan of reorganization, the creditors John Cashen and Patricia Springer came up with proposals. The corporation's attorney joined.

The trustee made a report in which he set forth the assets of the corporation to be $751,104.44. Earlier, the trustee reported that the grand total of liabilities was $456,022.79 (R. 9). At the reorganization hearing he estimated the total obligations to be $721,346.85. No appraisal was made by him.

Petitioners put an appraiser on the stand, who gave the valuation of the property at $846,702 (R. 90), but his valuations and his report were not admitted in evidence.

The notice of the hearing merely set the time for the hearing on the report of the trustee and application for fees (R. 43, 49).

At the hearing on November 5, 1956 the court took no testimony, except that of petitioners with reference to the advances of Mrs. Cashen (Patricia Springer) as to the amount of money she had advanced to the

corporation and her work, and discarded in effect the testimony of petitioner's appraiser; then stated he would adjudicate the corporation bankrupt; then denied application for trial by jury as to the question of insolvency or bankruptcy (R. 120), then he set aside his order or adjudication of bankruptcy and continued the matter to November 20. He also denied approval of the proposed plans of reorganization, denied leave to amend the same to cover some minor matters, denied leave to submit the plans to creditors. On November 7, without notice to anyone or previous service of proposed order, the court signed written orders denying the approval of reorganizations sought after. Such procedure without notice or opportunity to be heard denied petitioners due process of law guaranteed by the Fifth Amendment U. S. Constitution, and contrary to the rules of Civil Procedure and the general practice of law requiring service of proposed judgments and orders on the opposite party before being entered and to become final.

Appeal time therefore did not start to run at least until November 20 when the court first notified opposing counsel in the hearing at which he adjudicated the corporation bankrupt that he had denied approval of the proposed plans of reorganization.

The purpose of the requirement that Finding of Fact be filed by the trial court is to enable the reviewing court to determine the grounds on which the lower court reached its conclusions.

Continental-Illinois National Bank & Trust Co. v. Ehrhart, 127 Fed. (2d) 341.

In *Kelley v. Everglades Drainage District*, 319 U.S. 415, the Supreme Court of the United States reversed a case where there had been no Findings of Fact made as required by the Rules, stating as follows:

"Petitioners contend here, as they did in both courts below, that the plan discriminates unfairly in favor of the Class II creditors. But we are unable to reach that question since we agree with petitioners that the record lacks the findings of fact which the statute and the General Orders in Bankruptcy require, and which are necessary to the determination of that question.

"Section 83(e) of the Act requires that 'At the conclusion of the hearing, the judge shall make written findings of fact and his conclusions of law thereon.' And Rule 52(a) of the Rules of Civil Procedure, made applicable to bankruptcy cases by General Order in Bankruptcy No. 37, requires the court to 'find the facts specially.' In *Consolidated Rock Products Co. v. DuBois*, 312 U.S. 510, 520-525, 85 L.ed. 982, 990-993, 61 S. Ct. 675, 45 Am. Bank. Rep. (NS) 79, this Court held that in the absence of findings as to the value of the assets subject to the payment of the respective claims of each class of bondholders, the courts were in no position to exercise the 'informed, independent judgment' necessary to the discharge of their statutory duty to determine the fairness of a plan of corporate reorganization under the old §77B

of the Bankruptcy Act, 11 USCA §207. In *Ecker v. Western P. R. Corp.*, Nos. 7, 8, 20, 33, and 61 [318 US 448, ante, 892, 63 S.Ct. 692, 52 Am. Bankr. Rep. (NS) 469], and in *Group of Institutional Investors v. Chicago, M. St. P. & P. R. Co.*, Nos. 11-19, 32, decided March 15, 1943 [318 US 523, ante, 959, 63 S.Ct. 727, 52 Am. Bankr. Rep. (NS) 526], we hold the requirement of adequate findings applicable to railroad reorganizations under §77 of the Bankruptcy Act, 11 USCA §205, 3 FCA Title 11, §205."

Without findings of fact and without an opportunity to attack the findings of fact and conclusions of law denied to the appellants due process of law guaranteed by the Fifth Amendment to the Constitution of the United States, which provides as follows:

> "No person shall . . . be deprived of life, liberty or property without due process of law."

In the words of Webster so often quoted, that "By the law of land is intended the law which hears before it condemns" have been repeated in various forms of expression in a multitude of decisions.

Powell v. Alabama, 287 U.S. 68, 77 L.Ed. 170.

Without an appraisal regarding the value of this property and without findings of fact and conclusions of law, appellants have been deprived of due process of law and the case should be remanded to the District Court for the appointment of an appraiser and to the

taking of the testimony of the actual value of the property and Findings of Fact based upon actual evidence.

Important questions of bankruptcy law which have not been passed upon by this court are thus involved and certiorari should be granted.

As the petitioners are financially strapped leave is asked of this court to proceed upon the original record and papers, as provided in Section 250 of the Bankruptcy Act.

Respectfully submitted,

AQUA HOTEL CORPORATION
PATRICIA SPRINGER,
Creditor
JOHN H. CASHEN,
Creditor
Petitioners.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Dec. 17, 1957

In the Matter of)
AQUA HOTEL CORPORATION,) No. 15,439
Bankrupt.)

Appeal from the United States District Court for the District of Nevada

---

OPINION

Before: Fee, Barnes and Hamley, Circuit Judges.

HAMLEY, Circuit Judge:

This proceeding was instituted under Chapter X of the Bankruptcy Act, 11 U.S.C.A. §501 et seq., to obtain reorganization of Aqua Hotel Corporation. Following disapproval of two proposed reorganization plans, the court adjudicated the corporation a bankrupt, and converted the proceedings from reorganization to bankruptcy.

The corporation and its principal stockholders, John F. Cashen and his former wife, Mrs. Patricia Cashen Springer, president and treasurer, respectively,

of the corporation, appeal. Thomas J. McLaughlin, trustee of the corporation in the reorganization proceedings, appeared as appellee. Sydney H. Kaye, who became trustee in the bankruptcy proceedings, and Ralph J. Weiler, a creditor, applied for and obtained permission to intervene and defend against the appeal.

On August 1, 1955, Aqua Hotel Corporation (Aqua) began operating a hotel in Las Vegas, Nevada. Business did not come up to expectations, and the company soon found itself unable to pay its debts as they matured. The company therefore filed a petition in the district court, asking that corporate reorganization proceedings be had. The petition was filed on February 14, 1956, at a time when no bankruptcy proceeding involved the corporation was pending.

On February 16, 1956, an order was entered approving the petition and appointing a trustee. McLaughlin, who was named to this post, was authorized to take possession of the assets and property, and to carry on the business until further order of the court. The trustee was further directed to prepare and file, on or before May 11, 1956, a plan of reorganization or a report of his reasons why a plan could not be effected.

The time within which the trustee's report should be filed was thereafter extended to June 11, 1956. This same time limitation was set for the filing of proposed plans of reorganization by any other interested persons. The trustee's report was filed on that date, the position being taken that a plan of reorganization could

not be effected. The court then extended the time for the filing of proposed plans by other interested persons to September 17, 1956. A further extension to October 4, 1956, was later authorized. Both of these extensions were granted upon the request of appellants.

On September 29, 1956, two proposed plans of reorganization were filed, one by Cashen and Mrs. Springer, and the other by Mrs. Springer. In a report filed on October 3, 1956, the trustee estimated the obligations of the corporation to be $721,346.85, and its assets to be $751,104.44. The latter figure was based upon the trustee's examination of books, records, and documents, no appraisal having been made.

The trustee reviewed the operations of the business under his management, indicating that there had been neither loss nor profit, and that it could continue to break even if outstandnig obligations were disregarded. In this report, the trustee expressed the opinion that the plans proposed by Cashen and Mrs. Springer were not fair, equitable, or feasible. He, in effect, renewed his statement of June 11, 1956, that no acceptable plan of reorganization could be effected.

An order was entered setting for hearing on November 5, 1956, the trustee's report and the proposed plans of reorganization. A further question ordered to be considered at this hearing was whether, pursuant to §236(2) of the Bankruptcy Act, 11 U.S.C.A. §636 (2), debtor should be adjudged a bankrupt and bank-

ruptcy proceeding be ordered, or, in the alternative, whether the reorganization proceedings should be dismissed.

Following the hearing on November 5, 1956, an order was entered disapproving the proposed plans of reorganization submitted by Cashen and Mrs. Springer. Applications for allowances of compensation and reimbursement of expenses incurred in the proceedings were ordered to be filed by November 15, 1956. A hearing to consider these applications was set for November 20, 1956. The court took under advisement until that time the question of whether Aqua should be adjudicated a bankrupt.

As a result of the hearing held on November 20, 1956, an order was entered on November 21, 1956, adjudging Aqua a bankrupt and decreeing that bankruptcy proceedings be had pursuant to the applicable provisions of the Bankruptcy Act. The hearing on the applications for allowances was continued to December 4, 1956.

Following a hearing on December 4 and 5, 1956, an order was entered on December 17, 1956, making and denying allowances. On the latter date, another order was also entered, terminating forthwith operation of the hotel business. The proceedings were transferred to the referee in bankruptcy. McLaughlin was authorized to continue as trustee in reorganization until the appointment and qualification of a trustee in bankruptcy. The assets and property of the debtor were

then to be turned over to the duly qualified and acting trustee in bankruptcy.

On the following day, Aqua, Cashen, and Mrs. Springer filed a notice of appeal. On December 21, 1956, Aqua filed an amended notice of appeal. On January 4, 1957, the referee appointed Sydney H. Kaye as trustee in bankruptcy. He then came into possession of all of the assets of the debtor.

Appellants Cashen and Mrs. Springer have moved in this court to substitute Kaye, trustee in bankruptcy, as appellee in place of McLaughlin, trustee in reorganization, and to strike McLaughlin's brief.

Under the terms of the December 17, 1956, order, McLaughlin became *functus officio* as soon as Kaye qualified as trustee in bankruptcy and received from McLaughlin the assets and property of the debtor. Kaye is now the only authorized representative of the creditors. McLaughlin has no interest to protect aside from the personal one of avoiding resumption of his duties as trustee in reorganization, in the event appellants prevail. If he wished to avoid this, he can decline to serve. The motion is therefore granted.

Appellants Cashen and Mrs. Springer have also moved to disqualify Charles L. Garner as attorney for Kaye, and to strike the brief prepared and filed by Garner on behalf of Kaye. The motion was made on the ground that Garner had previously acted as attorney for appellant Mrs. Springer in these proceedings,

and was and is in a confidential relationship with her concerning this case.

Affidavits filed in connection with this motion indicate that, as an accommodation to one of Mrs. Springer's regular attorneys, from whom Garner subleases office space, Garner appeared for Mrs. Springer in two hearings, and performed other minor services in her behalf. Garner received no compensation for these services, did not come into possession of confidential information, and did not provide Mrs. Springer legal advice.

While there was here no breach of a confidential relationship, Garner was ill-advised in representing Kaye after having performed the indicated services for Mrs. Springer. The breach of a confidential relationship between attorney and client is a matter of such seriousness that any appearance of such a breach is to be avoided. Under the circumstances, however, we do not feel warranted in disqualifying Garner as attorney for Kaye. This motion is therefore denied.

Under their first specification of error, appellants argue that the assets of Aqua exceeded its liabilities, that Aqua was therefore not insolvent, and that a corporation involved in reorganization proceedings, which is not insolvent, may not be adjudged a bankrupt.

A person is insolvent, within the meaning of §1 (19) of the Bankruptcy Act, 11 U.S.C.A. §1 (19), whenever the aggregate of his property shall not, at a fair valua-

tion, be sufficient in amount to pay his debts. The court made no finding as to whether Aqua is insolvent, within the meaning of this statute.

The adjudication of Aqua's bankruptcy, however, was not made under the general provisions of the Bankruptcy Act, with regard to which §1 (19) governs.[1] The adjudication here was made under Chapter X of the act, pertaining to corporate reorganizations. The particular statutory provision which the court applied is §236 of the act, 11 U.S.C.A. §636, the applicable part of which is quoted in the margin.[2]

Aqua was unable to pay its debts as they matured, as the corporation itself alleged in its position seeking corporate reorganization. The only reorganization plans thereafter proposed were disapproved by the court. The court also denied further time for the amendment of such plans or the proposal of any other plans.

The existence of these circumstances authorized the court, proceeding under §236 (2), to enter an order

---

[1]Even under the general provisions of the act, insolvency is not always an essential element. See §3 (a) of the Bankruptcy Act, 11 U.S.C.A. §21 (a); 6 Collier on Bankruptcy (14th ed. 1947) 4255, §12.03.

[2]"§636. Failure to effectuate plan or consummation. If no plan is proposed within the time fixed or extended by the judge, or if no plan proposed is approved by the judge and no further time is granted for the proposal of a plan, or if no plan approved by the judge is accepted within the time fixed or extended by the judge, or if confirmation of the plan is refused, or if a confirmed plan is not consummated, the judge shall—

"(2) where the petition was filed under section 528 of this title, after hearing upon notice to the debtor, stockholders, creditors, indenture trustees, and such other persons as the judge may designate, enter an order either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this title, or dismissing the proceeding under this chapter, as in the opinion of the judge may be in the interests of the creditors and stockholders."

adjudging Aqua a bankrupt, and directing that bankruptcy be proceeded with. There is no provision in this statute, as there was under former §77B (c) (8), expressly excepting a solvent debtor from adjudication. The fact that such an exception was deleted in the enactment of §236 is a clear indication that insolvency, in the §1 (19) sense, was no longer to be an essential element in adjudicating bankruptcy in reorganization proceedings.[3]

We therefore hold that the court did not err in adjudicating Aqua a bankrupt without first finding that it was insolvent, as that term is defined in §1 (19) of the Bankruptcy Act.

Under their second specification of error, appellants contend that the court erred in denying the right to a trial by jury on the question of insolvency.

There was no trial on that question, nor, as we have seen, any need of one. Hence, there was no occasion to call a jury to determine such a question.

Under another specification of error, appellants challenge the order of November 7, 1956, in which the court disapproved the reorganization plans submitted by appellants, and denied the application for additional time within which to amend these plans.

Kaye contends that this court is without jurisdiction to review the order of November 7, 1956, because

---

[3]See 6 Collier on Bankruptcy, supra, 4255, ¶12.03, expressing the same view and quoting the confirmatory statement of the draftsmen of Chapter X. To the same effect, see *In re Dollar Dry Cleaning Co., Inc.* (D.Conn.), 35 F. Supp. 861. *Contra: John Hancock Mutual Life Ins. Co. v. Casey* (1 Cir.), 141 F. (2d) 104, cert. den. 323 U. S. 713.

the notice of appeal was not filed within thirty days of that date.

It is provided in §25 (a) of the Bankruptcy Act, 11 U.S.C.A. §48 (a), that appeals under that act shall be taken within thirty days after written notice to the aggrieved party of the entry of the judgment, order, or decree complained of, proof of such notice to be filed within five days after service. This section further provides that, if such notice be not served and filed, an appeal shall be taken within forty days from the entry of such judgment, order, or decree.

No notice of entry of the order of November 7, 1956, was served and filed. Appellants therefore had forty days, or until December 17, 1956, within which to appeal from that order. The original notice of appeal was filed on December 18, 1956. We are therefore without jurisdiction to review the order of November 7, 1956.

Under another specification of error, appellants argue that the court erred in denying the right to a trial by jury on the issue of whether the proposed plans of reorganization are fair, equitable, and feasible.

Since we are without jurisdiction to review that order, the asserted error in denying a jury trial with regard to the issues therein determined is not before us. In any event, examination of the record indicates that no demand was made for a jury trial on the issue

of whether the proposed plans of reorganization are fair, equitable, and feasible.

Under the remaining specifications of error, appellants question the refusal to allow the claim of appellant Mrs. Springer for repayment of monies alleged to have been advanced by her; the refusal to allow the claim of the debtor's attorney for services rendered on behalf of the corporation during the reorganization proceedings; and the amount of the fees allowed the trustee in reorganization and the latter's attorney.

Appeals from all orders making or refusing to make allowances in such proceedings are governed by §250 of the Bankruptcy Act, 11 U.S.C.A. §650. In *Dickinson Co. v. Cowan*, 309 U.S. 382, 385, it was held that appeals from such orders, under this section, may be had only at the discretion of the court of appeals. The proper procedure is to file in the court of appeals, within the time prescribed in §25 (a) of the Bankruptcy Act, 11 U.S.C.A. §48 (a), an application for leave to appeal. *Reconstruction Finance Corporation v. Prudence Securities Advisory Group*, 311 U. S. 579.

It is indicated in the case last cited that failure to follow such procedure is not jurisdictional. It is an irregularity which the court of appeals has discretion to disregard in the interests of substantial justice, where the scope of review is not affected. Thus, while a court of appeals normally "would be wholly justified in treating the mere filing of a notice of appeal in the

District Court as insufficient," it may overlook this irregularity to avoid an "extremely harsh" result in a particular case. *Reconstruction Finance Corporation v. Prudence Securities Advisory Group, supra,* 582.[4]

Appellants have not applied to this court for leave to appeal from the challenged order making and refusing to make allowances. Examination of the record fails to disclose any patent error with regard to allowances, or to indicate that an extremely harsh result would follow refusal to review this order. We therefore decline to review the order relating to allowances.

Appellants have moved the court for an order remanding this cause to the district court with directions to appoint an appraiser, and to take his and other testimony concerning the actual value of the debtor's property and testimony as to the fairness and feasibility of the proposed plans of reorganization, and to make findings of fact and conclusions of law thereon. The motion is denied.

The judgment is affirmed.

(Endorsed:) Opinion. Filed Dec. 17, 1957.
Paul P. O'Brien, Clerk.

---

[4]See, also, *Ross v. Drybrough* (2 Cir.), 152 F. (2d) 427; *Cohen v. Casey* (1 Cir.), 152 F. (2d) 610, 611. As stated in the latter case: ". . . It is in the contemplation of §250 of the Bankruptcy Act that appeals relating to allowance or disallowance of fees shall be expeditiously and summarily disposed of upon the original papers. . . ."

LIBRARY
SUPREME COURT, U.S.

No. 868

APR 1 0 1958
JOHN T. FEY, Clerk

IN THE

SUPREME COURT

OF THE

United States

October Term, 1957

In the Matter of:
AQUA HOTEL CORPORATION
(in reorganization),
Bankrupt.

AQUA HOTEL CORPORATION v.
McLAUGHLIN,
Bankrupt.

MOTION TO STRIKE BRIEF OF "INTERVENOR RALPH J. WEILER, IN RESISTANCE TO PETITION FOR WRIT OF CERTIORARI"

MORRIS LAVINE
215 W. 7th Street
Los Angeles 14, California
Attorney for
Aqua Hotel Corporation
Patricia Springer and
John Cashin,
Creditors and Petitioners.

IN THE

SUPREME COURT

OF THE

United States

October Term, 1957

In the Matter of: AQUA HOTEL CORPORATION (in reorganization), Bankrupt.	No. 868
AQUA HOTEL CORPORATION v. McLAUGHLIN, Bankrupt.	

MOTION TO STRIKE BRIEF OF "INTERVENOR RALPH J. WEILER, IN RESISTANCE TO PETITION FOR WRIT OF CERTIORARI"

COMES NOW AQUA HOTEL CORPORATION, Patricia Springer and John Cashin and move to strike the brief of Ralph J. Weiler on the following ground:

Intervenor was allowed to intervene in the Circuit Court stating he wished to combat one question only, namely, 'the right of petitioners to a jury trial.' In the Circuit Court his brief stated in its opening paragraph:

"The appeal in this case insofar as this Intervenor Ralph J. Weiler is concerned, interests us only on the question of whether or not the District Court erred in adjudging the Aqua Hotel Corporation to be a bankrupt without according to it a jury trial."

Weiler therefore has no right to appear in this court or to raise any other question and his brief in opposition should be stricken.

Weiler is a secured creditor, holding Trust Deeds on the property. He seeks to acquire the property by sale under his power of sale in his Trust Deeds and to wipe out all other creditors, including petitioners. He therefore opposes all plans of reorganization for which Chapter X was passed by Congress.

Contrary to his contention the brief raises important questions of bankruptcy law which have not been, but should be determined by this Honorable Court:

(1) Should a Corporation be adjudicated bankrupt when it applies for *reorganization* under Chapter X of the Bankruptcy Act when it appears to have more assets than liabilities although it cannot immediately pay its debts?

(2) Should the District Court act to adjudicate the corporation bankrupt without first obtaining an appraisal of the property, the only way in which it can logically and sensibly act, based on evidence.

(3) Did the Circuit Court err in refusing to remand the case to the District Court for an appraisal of the property and assets so that both the District Court and the reviewing court can determine from evidence what is fair, just and feasible?

(4) Is insolvency essential to a determination of bankruptcy of a corporation?

(5) Were the creditors entitled to separate notice and hearing on the question of whether the corporation should be adjudicated bankrupt after a hearing on whether a plan of arrangement should be adopted?

(6) Were the petitioners entitled to trial by jury on the question of insolvency?

(7) Were the proposed plans of reorganization fair, equitable and feasible and did the District Court err in refusing to allow petitioners to submit their plans to the creditors for their consents?

(8) Did the Circuit Court err in holding that our appeal time had run out one day for consideration of the plans of arrangement and the District Court's rejection of them when it was but one of the items considered by the trial court, and that court signed an order never served on petitioners or their counsel disallowing the plans of arrangement?

These are all important questions of bankrupt law which should be determined by this Court.

For which reasons we pray that the brief of Intervenor Weiler be stricken and that certiorari be granted and that petitioners be permitted to proceed on the original record.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Petitioners,
Aqua Hotel Corporation, Inc.
Patricia Springer, Creditor
John Cashin, Creditor
and Principal Stockholders

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Continental-Illinois National Bank & Trust Co. v. Ehrhart, 127 F. 2d 341	8
Conway, Matter of, 127 F. 2d 972	11
Kelley v. Everglades Drainage District, 319 U. S. 415	8
Powell v. Alabama, 287 U. S. 68, 77 L. Ed. 170	8

RULES

Federal Rules of Civil Procedure, Rule 52	9
Rules of the United States Supreme Court, Rule 38, Subd. 5b	8
Rules of the United States Supreme Court, Rule 39(2)	2

STATUTES

Bankruptcy Act, Sec. 19	10
Bankruptcy Act, Sec. 128	9
Bankruptcy Act, Sec. 236(2)	7, 9
United States Code Annotated, Title 11, Chap. 4, Sec. 42	10
United States Code Annotated, Title 11, Sec. 528	9
United States Code Annotated, Title 11, Sec. 543	9
United States Code Annotated, Title 11, Sec. 636	9

IN THE

Supreme Court of the United States

October Term, 1957

No. _____

In the Matter of

AQUA HOTEL CORPORATION (in reorganization),

Bankrupt.

Brief of Intervenor in Resistance to Petition for Writ of Certiorari.

In this morning's mail the undersigned received a petition for writ of certiorari apparently filed in this Court unverified, unsigned by an attorney who is a member of the bar of this Court and almost completely lacking in accurate record citations, which makes it most difficult to answer. The undersigned is appearing on behalf of Ralph J. Weiler, a creditor who had applied to the United States Court of Appeals for the Ninth Circuit and obtained permission to intervene and defend against the appeal. (See petitioners' Appendix, p. 2, lines 5-6.) Mr. Weiler therefore has standing before this Court in resisting the petition for writ of certiorari. Unfortunately the writer of this brief is not in possession of anything except a 213 page Reporter's Transcript of Proceedings in the District Court, and he does not have copies of any

of the orders or notices complained of by the petitioners. In view, however, of the fact that the petition for writ of certiorari bears on the cover the name of Morris Lavine, attorney at law, 215 West Seventh Street, Los Angeles 14, California, Trinity 3241, as attorney for the petitioners, the writer shall, notwithstanding the fact that neither the petition nor the brief is signed by a member of the bar of this Court and is completely unverified or sponsored, serve this brief in opposition to the granting of the writ on Mr. Lavine and file the same with this Court to the end that the interminable litigation involving the Aqua Hotel since February 14, 1956 (see petition for writ of certiorari, p. 2) be terminated and the administration of the estate proceed, secured creditors receive their money and unsecured creditors receive their dividend, if any.

Rule 39, subdivision 2, of the Rules of the Court reads as follows:

> "All printed documents presented to the Court, other than records, must bear on the cover the name and post office address of the member of the bar of this court who is counsel of record for the party concerned and upon whom service is to be made. The individual names of other counsel and, if desired, their post office addresses, may be added. The body of the document shall at its close bear the printed names of counsel of record and of such other individual counsel as may be desired . . ."

An attempt to verify the record references, insofar as the writer of this brief is concerned, leaves him completely in a fog. It remains a mystery to the writer whether the petitioners are referring to the Reporter's Transcript of Proceedings or to other documents in the record which

have not been served upon the writer or have not been made available to him. At page 13 of the petition we find:

> "Petitioners put an appraicer on the stand who gave the valuation of the property at $846,702 [R. 90] but his valuations and his report were not admitted in evidence."

An examination of the Reporter's Transcript does show that Elmo C. Bruner was called as a witness on behalf of the petitioners at page 85 of the Transcript, and at page 90 in response to a question by Mr. Lavine, he testified to a total figure of valuation of $846,702.00. But we have not been able to find any place in the record where Mr. Bruner's testimony was stricken nor any place where the Court refused to permit him to testify.

On the other hand, we find similar record references which clearly must pertain to something else. For instance, at page 3 of the petition, it is asserted:

> "It estimated its grand total of indebtedness at $456,022.79 [R. 9]; its assets it listed at $603,537.24. Its total net income for six months prior thereto was listed at $47,807.94 [R. 10]. It sets forth that upon reorganization that its estimated profits from food operations could be $368,000 gross and a net of $83,250 and that it had a potential slot machine profit of $40,000 [R. 13]."

An examination of the Reporter's Transcript, if this is the reference meant by petitioners in said petition, that pages 9, 10 and 13 were confined entirely to discussion between the Court and various counsel. Nowhere on any of said pages appears any of the figures set forth under the record references in the petition.

On page 3 of the petition we find the statement with a record reference:

> "The Court gave to *May* 11, 1956 to submit a plan or report why a plan cannot be effected [R. 22]." (Emphasis ours.)

Upon an examination of the Reporter's Transcript at page 22 is found a summarization by the Court of a report made by Thomas J. McLaughlin, Trustee in reorganization, in connection with which the Court says:

> "The Court fixed a date of *June* 11, 1956 as the time within which any interested persons should prepare and file a plan of re-organization or the Trustee should file his report of his reasons why a plan could not be effected." (Emphasis ours.)

At the bottom of page 3 of said petition the petitioners proceed to describe a plan "whereby it was proposed to issue 500,000 shares of additional stock with an application and a right to sell the same at $1.00 a share and Class B stock likewise to be redeemable [R. 31].

In the Reporter's Transcript at page 31 is a reading by the District Judge of the Trustee's recommendation that additional plans for reorganization would probably not be submitted due to the particularly heavy amount of indebtedness still outstanding against the corporation; the fact that little or no interest has been expressed by anyone in favor of submitting a plan of reorganization and the recommendation of the Trustee under Chapter X that the Court determine after reading the Trustee's report whether the Court should enter an order directing the Trustee to file a petition for an order either adjudging the debtor corporation bankrupt and directing that bankruptcy be proceeded with pursuant to the Bankruptcy

Act, or enter an order dismissing the proceedings under this chapter as in the opinion of the Judge may be in the interests of the creditors and stockholders.

We believe that the Justices of this Court passing on this petition for writ of certiorari will be just as bewildered as is the writer of this brief, unless there is some record before this Court which has not been served upon the writer and about which he knows nothing. He shall, however, briefly discuss the merit of this case and the reasons why, in his opinion, the petition for writ of certiorari should be promptly denied and the litigation terminated.

In the petition these petitioners attempt to at least insinuate to this Court that no notice was sent out to creditors, including appellants, that the Court would consider a plan of reorganization or a report on why such a plan cannot be effected that was sufficient notice that the corporation would be adjudicated a bankrupt. (See p. 9 of petition, subd. 4 under the subject of Questions Presented.)

The Reporter's Transcript shows that on Monday, November 5, 1956, a hearing was had before Judge Foley at which Patricia Springer appeared by her attorneys, John W. Bonner and Morris Lavine, and the debtor appeared by John A. Porter and the petitioner, John F. Cashen, appeared by John A. McNamee. At page 48 of the Reporter's Transcript is found that after the Court had recessed until 2:00 P.M., at the suggestion of the Court, Mr. Porter, counsel for the debtor, read:

> "Pursuant to the notice served the present hearing is stated to be concerned with the following matters . . . (3) why an order should not be entered adjudicating the debtor a bankrupt."

Strange indeed that this petitioning debtor and the holders of practically all of its stock should now contend that they had no intimation that the question of adjudication was to come up when the attorney for the corporation, himself, was reading a notice in open Court indicating that that subject would be passed on. At page 17 of the Transcript, the Court read from an order issued October 4, 1956, at which time there were present John A. Porter, attorney for the debtor corporation, Patricia Springer, formerly Patricia Cashen, creditor and stockholder, and Morris Lavine, attorney for Patricia Springer. The Court read at page 19 the following:

> "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said trustee be and he hereby is directed to give at least 10 days notice of the time fixed herein for said hearing under Sections 169 and 236(2) of the Bankruptcy Act by mailing such notice to the creditors and stockholders of said debtor as the same may appear on the debtor corporation's records or as the same may be known to said trustee, to the Secretary of the Treasury, Washington, D. C., by mailing 2 copies of such notice to the Securities & Exchange Commission by registered first class mail, postage prepaid, addressed to it at Washington, D. C. or at such other place as the Securities & Exchange Commission shall designate by written notice filed in this proceeding, and served upon the parties to this proceeding, to all attorneys of record, and all other interested parties known to said trustee, and by publication thereof in the Las Vegas Review Journal and the Las Vegas Sun, each being newspapers published and having general circulation in Las Vegas, Nevada, on October 25, 1956, such notice to be as in the form attached hereto marked Exhibit 'A' and thereby made a part hereof."

It is to be presumed that the trustee did the duty imposed upon him by the Court. Strange it is, indeed, that none of the numerous parties in interest seeking certiorari here, or the attorneys representing them, received the notice prescribed under Section 236, subdivision 2, of the Act which expressly provides that:

> "After hearing upon notice of the debtor, stockholders, creditors, indenture trustees, and such other persons as the Judge may designate, enter an order either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this Act, or dismissing the proceeding under this chapter, as in the opinion of the Judge may be in the interests of the creditors and stockholders."

It is rather an unusual situation, indeed that the contention should be made for the first time in this Court that these petitioners had no notice of the possibility of an adjudication in bankruptcy.

After reading the foregoing order, at page 32 of the Reporter's Transcript, the writer finds the following:

> "Court: Now, that is the order. Now, I take it that the trustee has given notice. Is that right Mr. Keefer?
>
> Mr. Keefer (attorney for the trustee): Yes, Your Honor.
>
> Court: And this Court is now in a position, so far as the jurisdiction of the Court is concerned, and the question of whether or not proper notice has been given to all interested parties, the Court would be in a position, if it felt that this was the proper thing to do, to adjudge the debtor a bankrupt at this time?

Mr. Keefer: Yes, Your Honor. However, the order and notice did provide for a hearing upon the plans.

Court: At the same time.

Mr. Keefer: At the same.

Court: The Court could have that hearing. However, if the Court, after the hearing, determined the proper procedure was to adjudge this debtor a bankrupt sufficient notice has been given to all parties?

Mr. Keefer: Yes."

In support of their petition for writ of certiorari, the petitioners content themselves with citing just three legal authorities, namely, *Continental-Illinois National Bank & Trust Co. v. Ehrhart,* 127 F. 2d 341; *Kelley v. Everglades Drainage District,* 319 U. S. 415, and cases cited in the quotation therefrom; *Powell v. Alabama,* 287 U. S. 68, 77 L. Ed. 170. (Petition, pp. 15-16.)

In support of a statement that the bankrupt was ... by the "Las Vegas slump" (Petition, p. 12), the petitioners cited "(See Life Magazine)."

Nowhere in the petition is there any contention that dissension exists between two or more Courts of Appeal, or that the District Court has decided an important question of local law in a way probably in conflict with applicable local decisions or has decided a Federal question in a way probably in conflict with applicable decisions of this Court or has so far departed from the usual accepted course of judicial proceedings, or so far sanctioned such a departure by a lower Court as to call for an exercise of this Court's power of supervision. See Rule 38, subdivision 5b of Rules of the Supreme Court.

The petitioners content themselves with merely stating at page 12 of the Petition that important questions of

bankruptcy law, which have not been but should be decided by this Court, are presented by this petition and that the Court below has also decided this case contrary to the law and contrary to Rules of Civil Procedure, Rule 52, requiring findings of fact and conclusions of law to be stated in bankruptcy, as well as other matters.

The writer does not believe that these petitioners were in any wise harmed or deprived of any of their rights. In the first place the jurisdiction of the District Court was voluntarily invoked by the petitioner Aqua Hotel Corporation through John S. Cashen, its president, under Section 128 of the Bankruptcy Act of 1938, 11 U. S. C. A., Section 528, which reads as follows:

> "If no bankruptcy proceeding is pending an original petition may be filed with the Court in whose territorial jurisdiction the corporation has its principal place of business or its principal assets for the preceding six months or for a longer portion of the preceding six months than in any other jurisdiction."

Complaint is made that upon failure to file a satisfactory plan of reorganization, District Judge Foley exercised his right to adjudicate this petitioner a bankrupt under the provisions of subdivision 2 of Section 236 of the Bankruptcy Act (11 U. S. C. A., Sec. 636). In fact, it should be expressly noted that even in the case of an involuntary petition filed against a corporation under Chapter X and controverted by it, not only is no provision for a jury trial made but on the contrary the Act expressly provides that the controverted issues of fact shall be determined by the Judge without the intervention of a jury. (See 11 U. S. C. A., Sec. 543.)

To put it briefly and succinctly, the plaint of petitioners before this Court now is that they voluntarily subjected

the Aqua Hotel Corporation to the jurisdiction of the United States District Court for the District of Nevada, proposed a plan of reorganization which was not satisfactory to the creditors or was not feasible and could not be approved, and found the corporation ultimately adjudicated a bankrupt. After staying the hands of their creditors (or rather the creditors of the corporation) for a period in excess of two years, the petitioners now ask this Court to review and reverse the well reasoned ruling of an experienced District Judge and reverse the opinion of the United States Court of Appeals, and demand that a new appraisal be made, a jury trial granted and the creditors held up for a couple of years more.

In the writer's opinion the petition for writ of certiorari in this case borders on the ludicrous. It is as though a debtor owing close to one-half million dollars in secured and unsecured obligations filed a voluntary petition in bankruptcy in the United States District Court having jurisdiction over his property and then, for some reason or other, changed his mind and took an appeal from the adjudication which he had voluntarily brought upon himself on the ground that the District Judge had not called a jury and submitted to it the questions of his insolvency and commission of an act of bankruptcy as provided for in involuntary cases under Section 19 of the National Bankruptcy Act. (11 U. S. C. A., Chap. 4, Sec. 42.) To sustain the position taken by these petitioners would, in our opinion, create a chaotic condition. It would permit debtors to file futile Chapter X or Chapter XI proceedings staying the hands of their creditors, postpone the payment of their honest debts and then, upon failure after a period of months or years to present a satisfactory or feasible plan, demand a jury trial as a prerequisite to their adjudication. In the case at bar, the hands of Aqua's creditors

have been stayed for at least 25 months. Because of dilatory appeals and obstructive tactics these creditors have been powerless to realize anything on their debts.

When Judge Roger Foley's patience ultimately ran out and he properly adjudicated Aqua a bankrupt, an appeal was taken to the Ninth Circuit, the judgment affirmed and on the last day to file a petition for rehearing such petition was filed. Rehearing was denied and was followed by an *ex parte* application for stay of mandate which was granted to April 10, 1958. A motion for modification of this *ex parte* order was granted by the Ninth Circuit on March 3, 1958, cutting down the time to apply for certiorari to March 20, 1958.

We will conclude by quoting from the language of Judge Clarke in the *Matter of Conway*, 127 F. 2d 972:

> "Having asked for mercy he can hardly be permitted to bite the hand from which it was dispensed. the ability to waive a constitutional provision intended for the protection of one's property rights is elementary."

We respectfully submit that the petition for writ of certiorari be promptly denied.

Dated: March 24, 1958.

THOMAS S. TOBIN,
Attorney for Respondent, Ralph J. Weiler.

FRANK C. WELLER,
HUBERT F. LAUGHARN,
Of Counsel.

SUBJECT INDEX

PAGE

Motion for Substitution of Present Trustee in Bankruptcy for Removed Trustee as Respondent 1

Order approving trustee's bond 2

Brief for the Respondent in Opposition 3

Opinions below and jurisdiction 3

Statement of the case 3

Argument 6

Conclusion 11

TABLE OF AUTHORITIES CITED

CASES	PAGE
Consolidated Rock Products Co. v. DuBois, 312 U. S. 510	8
Dollar Dry Cleaning Co., Inc., In re, 33 Fed. Supp. 861	7
Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific R. Co., 318 U. S. 520	8
John Hancock Mutual Life Ins. Co. v. Casey, 141 F. 2d 104	8
RULES	
Rules of the United States Supreme Court, Rule 19:1(b)	6
STATUTES	
United States Code, Title 11, Sec. 576	6
United States Code, Title 11, Sec. 636	7, 9

IN THE

Supreme Court of the United States

October Term, 1957
No. 868

In the Matter of
AQUA HOTEL CORPORATION (in reorganization),
Bankrupt.

Motion for Substitution of Present Trustee in Bankruptcy for Removed Trustee as Respondent.

Harry C. Levy respectfully moves this Honorable Court for an order substituting him, in his capacity as Trustee in Bankruptcy of the Estate of the Aqua Hotel Corporation, as Respondent herein, without prejudice to the proceedings already had in this action, and, as grounds therefor, shows to the Court that the opinion of the Ninth Circuit Court of Appeals held that the trustee in bankruptcy, who was in actual physical control and custody of the assets, was the only authorized representative of the creditors and the proper appellee therein, and that since said opinion has been filed that Sydney H. Kaye was removed as trustee of the estate of Aqua Hotel Corporation, Bankrupt, and movant was nominated by creditors, appointed by Court, and did qualify and now is acting as trustee in bankruptcy, see appended Order approving Bond of Trustee. Movant herewith appends his Brief in Opposition to Petition for Writ of Certiorari herein.

Dated: April 16, 1958.

Respectfully submitted,

CALVIN C. MAGLEBY,
Attorney for Harry C. Levy, Trustee in Bankruptcy of Estate of Aqua Hotel Corporation.

CHARLES L. GARNER,
Of Counsel.

"United States District Court for the District of Nevada.

In the Matter of Aqua Hotel Corporation, Bankrupt.

In Bankruptcy. No. 71.

ORDER APPROVING TRUSTEE'S BOND.

At Las Vegas, in said district on the 4th day of April, 1958.

The above named Aqua Hotel Corporation, having been duly adjudged a bankrupt on a petition filed by ~~(or against)~~ ~~him~~ it on the 14th day of February, 1956; and HARRY C. LEVY, of Las Vegas, in said district, having been duly appointed trustee of the estate of said bankrupt, and having duly qualified by giving a bond with sufficient sureties for the faithful performance of his official ~~duties in the~~ amount fixed by the order of this court, viz., FIFTY THOUSAND and no/100 ($50,000.00) dollars;

IT IS ORDERED that the said bond be, and it hereby is, approved.

JOHN C. MOWBRAY,

Referee in Bankruptcy."

IN THE

Supreme Court of the United States

October Term, 1957.
No. 868.

In the Matter of
AQUA HOTEL CORPORATION (in reorganization),
Bankrupt.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth District.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

Opinions Below and Jurisdiction.

See Writ of Certiorari of Petitioners.

Statement of the Case.

The Aqua Hotel Corporation, a Nevada corporation formed March 15, 1955, by voluntary petition on the 14th day of February, 1956, instituted proceedings under Chapter 10 of the Bankruptcy Act. The Petitioner admitted not being able to pay their debts as they matured (P. 1[1]), also, even though the book assets included Organization Expense of $44,454.35 (p. 11) the deficit of the corporation was $53,453.50 more than the Capital (p. 10), and net loss of corporation during its 10 months of business

[1] "P" references are to pages in original Petition.

was $36,641.47 plus Capital Expense of $60,375.12 (p. 12).

On March 9, 1956, the Court ordered the Trustee to prepare and file Trustee's Report on Plan of Reorganization and scheduled a hearing on Plan or Report for May 11, 1956, but thereafter the hearing was extended until June 11, 1956.

On said June 11, 1956, the Trustee filed a report stating a plan could not be effected and the debtor corporation filed an Objection to said report and hearing on said Report and Objections thereto was set for September 17, 1956, with all parties directed to submit any plans of reorganization to Trustee before September 17, 1956. The hearing of September 17, 1956, on motion of Court, was vacated and reset October 4, 1956, but said Order was silent as to deadline for submission of a Plan of Reorganization to Trustee.

On October 4, 1956, Trustee filed a second Report stating a Plan was not feasible but this without knowledge that on September 29, 1956, the Debtor corporation and its two principal stockholders had filed Plans of Reorganization with the Court. On October 4, 1956, a hearing was held and Court indicated its intention to bring the proceedings to a close and adjudicate the Debtor a Bankrupt, also the Court requested authorities from Trustee and Debtor whether the Court had the power to adjudicate and thereafter Debtor failed to supply requested authorities.

This hearing was continued to November 5, 1956, and on November 5, 1956, the Debtor submitted to the Court evidence that the Replacement Cost of the Assets of the Debtor was $846,702.00, the land being worth $316,467.00 [R. 90[2]], but the court held that the proper appraisal was earning power and therefore denied the offer of proof. Also, on November 5, 1956, the Court denied approval of the Plans submitted by Debtor and its principal stockholders, further denied amendments thereof, further adjudicated Debtor a Bankrupt but withdrew Order so that Application for Allowances could be made, and further set hearing on allowances for November 20, 1956.

On November 20, 1956, Court refused written demand of Debtor for a jury trial on question of insolvency and adjudicated Debtor a Bankrupt and set December 4, 1956, for hearing on allowances.

On November 21, 1956, Court filed Order of Adjudication and on December 4 and 5, 1956, held hearing on applications for allowances and Court directed counsel to prepare formal Order of Adjudication. On December 21, 1956, an amended Notice of Appeal was filed.

No separate Findings of Facts or Conclusions of Law were filed with each of the forementioned orders, but that instead, the finding was made part of the Order and was solely a recital of the language of the Bankruptcy Act, Chapter 10.

---

[2]"R" references are to pages in Reporter's Transcript.

Argument.

Rule 19:1(b) of this Court sets out the Considerations governing reviews on Certiorari, and in the case at hand only three could conceivably have any application, namely, (a) Conflict between circuits, (b) question so important that settlement should be by this Court, and (c) such a radical departure sanctioned by Court of Appeals that this Court should excuse its power of supervision.

The Petitioners list 12 questions presented and the Respondent will use the Petitioners' numbers:

1. This question is now urged for the first time although reference thereto was made in the Appellant's Reply Brief to Circuit Court of Appeals at page 8.

The law, 11 United States Code, Sec. 576, is clear and there had been no entry of an order approving the plan; this was one of the major changes between 77-B proceedings and Chapter 10. No reason is given anywhere by the Petitioners why this is error; the reason for the consent of the Court is for a more orderly conduct of he proceedings and surely Congress has the power to enact such a section.

2. The District Court had before it a Report on Why a Plan Cannot Be Effected and a Plan consisting of but few thoughts—"give us back the assets, we'll find someone who will buy stocks and then we'll put in some gaming devices and in time all persons will get paid." The Plan did not meet a single test of being fair, equitable and feasible. Not one dollar was pledged, no guarantees were given, no management assured. The Plan was so totally lacking in content that it was not a bona fide Plan. At least 12 deficiencies were discussed in Court. It even proposed

the Court finance the starting of the venture. The pattern set up in Chapter 10 is clear, the Court is charged to apply sound business principles and in most cases must seek the outstanding professional assistance of Securities Exchange Commission, and nowhere in any proceedings have the Petitioners maintained the submitted Plans were, in fact, fair, equitable and feasible.

3. The Orders were made in open Court and in fact served on all counsel of record for the Debtor. Mr. Lavine, who was not served, was only an associate counsel. In fact, Mr. Lavine was present in Court when the Orders were made. It is hard for the writer to consider the question of service upon each one of four counsel representing a party so important as to require a decision of this Court. It is equally hard for the writer to see how the recital of the statutory language, 11 United States Code, Sec. 636, as a finding of fact and the basis of an order could, in fact, start an appeal time to run anew.

4. The notice of November 20, 1956, hearing stated that adjudication of Bankruptcy would be considered and this notice was not only sent to all parties of interest but published in a paper of general circulation.

5. This question appears to the writer to be the crux of the Petitioners' Writ of Certiorari. The District Court proceeded on the basis that proof of insolvency was not a requirement as to adjudication.

On the question of whether insolvency is an essential element before there can be an adjudication the case of *In re Dollar Dry Cleaning Co., Inc.* (D. C., Conn.), 33 Fed. Supp. 861, holds that it is not and some authorites

hold that *John Hancock Mutual Life Ins. Co. v. Casey* (1 Cir.), 141 F. 2d 104, is to the *contra,* and therefore now with *In re Aqua Corporation* (9 Cir.),—a conflict between circuits exists. But this overlooks that the *Hancock* case remark was entirely dicta, not an issue there decided and merely a limitation of a totally different concept. It further assumes that here solvency did, in fact, exist or at least the existence of evidence from which solvency could be proven. But this element is totally lacking; further, at all stages the Debtor failed, although requested, to assert that solvency would be a bar, and hence waived same.

Here we have a corporation which after formation was in business but 10 months and whose earning power was a loss of $36,641.47 plus Capital Expense of $60,375.12 [R. 11], and if the mandate of *Consolidated Rock Products Co. v. DuBois* (1941), 312 U. S. 510, and *Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific R. Co.* (1943), 318 U. S. 520, is followed, that is, the proper valuation method is earning power of a going concern, the value would be zero, because it is impossible to capitalize a loss figure; the cold hard facts are that the Debtor was losing money even before it paid interest on secured indebtedness of stockholders. Therefore, an appraisal on the earning power just is not mathematically possible and with debts of more than $700,000.00 plus the stock, insolvency did in fact exist. It is our contention that any error in not spending moneys of the Reorganization Court for an appraisal, any error of refusing to have endless testimony on this sort of value, or that sort of value is, if error, harmless error.

The second part is briefly, where the facts clearly point to one course, must the District Court in its Order say

two and two by definition make four, or merely can the Court recite the language of the Statute as its findings. The stand taken by the Petitioners appears to be, after much study we have found a general statement of law that the Rules of Civil Procedure apply to Bankruptcy Matters, including Chapter 10 proceedings, and therefore the proceedings must be reopened, the Honorable Judge must spell out his reasons with particularity, further Petitioners must have an opportunity to challenge the probative value of each fact and of each rule of law regardless of how inconsistent it may be to the spirit of the Bankruptcy Act. It is our contention that the applicability of the Federal Rules does not mean that the hardest, the most time consuming, way must be used each time.

Simply, whether to adjudicate turns on what "in the opinion of the Judge may be in the interests of the creditors and stockholders," and in this mandate, 11 United States Code, Sec. 636, consistenf with the Court being required to give with particularity the reasons for each step in the Court of the proceeding? Also, the conduct of matters in the Bankruptcy Court is supposed to be efficiently handled with the review periods shortened with rules of evidence modified, with hearings generally on Petitions and Show Cause; are these practices consistent to the position suggested by Petitioners?

6. This question is implicitly stated in question 5 and nowhere does petition suggest that by remanding a different result will be had. Due Process does not require prolonged and endless litigation and also the Due Process argument was raised for the first time on appeal.

7. This question is merely a rephrasing of Question 5 and consists of the most favorable statements and sug-

gestions in argument at the various hearings. It should be remembered that some 91 various documents were filed in this proceeding prior to adjudication and 10 months of hearings and conferences had by the District Court; hence it is hard to see how the Petitioners can claim there was no evidence taken prior to adjudication. The book value assets of the Bankrupt Corporation by their own admission was but $558,855.70 and for a period of ten months these assets had lossed $97,016.59, hence it is hard for the writer to accept any $751,104.44 figure.

8. Inasmuch as insolvency is not a condition for adjudication, there is no requirement for it to be decided and further, Chapter 10 sets up a pattern of no jury trials.

9. This is a misstatement of fact; at no time did the principal stockholder meet hotel operating payrolls and other expenses incurred by Trustee. The hotel operating payroll and other expenses were incurred prior to the 14th day of February, 1956, the day of the filing of the original Petition herein and hence question presented, in fact, does not exist.

10. A hearing on the allowance for the corporation and creditors' attorney was held in the District Court who held no benefit to the estate. The law is clear, "appeals from all orders" means simply "all" not "only" orders relating to allowances.

11. This question is merely a rephrasing of Question 10 and the direction of the law is clear.

12. This question is merely a rephrasing of Question 5 and therein answered.

Conclusion.

In view of the foregoing, no valid reason for the granting of the Writ of Certiorari has been shown and we respectfully submit that the Petition for Writ of Certiorari be denied.

Dated: April 17, 1958.

Respectfully submitted,

CALVIN C. MAGLEBY,

Attorney for Harry C. Levy, Trustee in Bankruptcy of The Estate of Aqua Hotel Corporation.

CHARLES L. GARNER,

Of Counsel.

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JUN 19 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. 868.

In the Matter of

AQUA HOTEL CORPORATION (in reorganization),

Aqua Hotel Corporation vs. McLaughlin (Kaye).

PETITION FOR REHEARING.

MORRIS LAVINE,
215 West Seventh Street,
Los Angeles 14, California,
Counsel for Appellants, Patricia Springer, John Cashen, Creditors Aqua Hotel Corporation.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Cole v. Arkansas, 333 U. S. 196	2
Oliver, In re, 333 U. S. 257	2
Snyder v. Massachusetts, 291 U. S. 97	2
United States v. Hayman, 342 U. S. 205	2

STATUTES

Bankruptcy Acts, Sec. 24	2
Bankruptcy Act, Sec. 25	2
United States Code, Title 11, Sec. 19(a)	2
United States Constitution, Fifth Amendment	1, 2
United States Constitution, Fourteenth Amendment	2

IN THE

Supreme Court of the United States

October Term, 1957

No. 868.

In the Matter of

AQUA HOTEL CORPORATION (in reorganization),

Aqua Hotel Corporation vs. McLaughlin (Kaye).

PETITION FOR REHEARING.

Comes now Aqua Hotel Corporation and respectfully petitions for rehearing on the following grounds:

I.

The Court has overlooked fundamental questions of bankruptcy law, which have not been, but should be decided by this honorable court in the supervision of its administration of bankruptcy appeals.

(a) The decision of the court below and this court's denial of certiorari in effect denies appellants due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

(b) The decision of the court below erroneously construes the law regarding the right to jury trials, under the circumstances of this case.

Appellants were the only ones who submitted plans of reorganization to the trustee. The trustee submitted the plans to the district court with a recommendation for

their rejection. The matter came on for hearing, and the trial judge, continuing all other matters to a future date for hearing, nevertheless signed an order rejecting the proposed plans of arrangement. This order was never served upon appellants and they did not have any notice of it. Nevertheless the Circuit Court held that on appeal from the order of adjudication in bankruptcy, our notice of appeal, filed forty-one days after this unnoticed and unserved order and judgment was signed was TOO LATE for review on appeal.

This court has frequently said that notice and an opportunity to be heard are the first essentials of due process of law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

In re Oliver, 333 U. S. 257;

United States v. Hayman, 342 U. S. 205, 220;

Snyder v. Massachusetts, 291 U. S. 97.

The appellants, having been denied notice, lost something indispensable. Where an appeal is of right (Bankruptcy Act, Secs. 24, 25), a denial thereof is a denial of due process.

Cole v. Arkansas, 333 U. S. 196.

(c) The failure of the court to accord a jury trial on demand, has also never been passed upon by this court.

In the circumstances of this case, the trial court having refused consideration of reorganization, or the right to submit the proposed plans to the creditors, the declaration and order adjudicating the corporation bankrupt was in effect involuntary. As such, it was entitled to a trial by jury, on the question of its insolvency.

Bankruptcy Act (11 U. S. C. 42), Sec. 19(a).

We preserve all other points previously urged as though fully set forth herein in the event the court grants this petition for rehearing.

MORRIS LAVINE,

Counsel for Appellants, Patricia Springer, John Cashen, Creditors Aqua Hotel Corporation.

Certificate of Counsel.

I, Morris Lavine, Counsel for Appellants, hereby certify that the foregoing petition for rehearing is filed in good faith and not for the purpose of delay, and that petitioner believes the grounds herein are meritorious. He further certifies that the matters presented are important questions of notice required under the Fifth Amendment and are restricted to the grounds above specified.

MORRIS LAVINE,

Counsel for Appellants, Patricia Springer, John Cashen, Creditors Aqua Hotel Corporation.